

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 62899-2-I
)	
Respondent,)	
)	
v.)	
)	
DEREK QUENTIN LEWIS,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: July 26, 2010
)	

Ellington, J. — Derek Lewis was convicted by a jury of two counts of rape of a child in the first degree and one count of child molestation in the first degree. Lewis appeals, arguing that the trial court violated his right to a fair trial by allowing testimony that improperly bolstered the testimony of the victim. Lewis also claims that the trial court violated his right to be present at trial by finding that he voluntarily absented himself when he failed to appear for the conclusion of his trial. We affirm Lewis's convictions, but accept the State's concession that resentencing is required because two of the convictions involved the same criminal conduct under RCW 9.94A.589(1)(a).

FACTS

Lewis is the biological father of D.L., who was four years old at the time of the alleged offenses. Lewis married D.L.'s mother, Wendy Frost, in 2002. Lewis watched

D.L. during the day while Frost was at work, and also occasionally at night. In April 2007, he was watching D.L. while Frost went out to play bingo with her mother. When Frost returned, she noticed that D.L.'s bottom was red, but thought it was only a rash.

Approximately two weeks later, D.L. told Frost that she and her father had watched an adult movie. D.L. described a scene in the movie with sexual content. Frost confronted Lewis while D.L. was present and D.L. disclosed that Lewis had also shown her a pornographic magazine, and had anally raped her. Frost left with D.L. to stay with Frost's parents, where D.L. made further disclosures that Lewis had touched her inappropriately.

Frost reported D.L.'s allegations and D.L. was interviewed in the prosecutor's office by child interview specialist Carolyn Webster. During the interview, D.L. stated that Lewis anally raped her. D.L. stated that she touched his penis, and made a hand motion simulating masturbation. She also stated she watched an adult movie with her father, and looked at magazines with him.

King County Sheriff detectives interviewed Lewis. Lewis corroborated and elaborated on D.L.'s statements that he penetrated her anus both digitally and with his penis. Lewis claimed this happened on Frost's bingo night, when he was home alone with D.L.

D.L.'s trial testimony largely corroborated her earlier statements.

Lewis was charged with three counts of rape of a child in the first degree (counts one, two, and four) and one count of child molestation in the first degree (count three). The jury acquitted Lewis on count two and convicted him on counts one, three, and

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four. Lewis appeals.

DISCUSSION

Opinion Testimony

Over Lewis's objection, Frost testified that she talked to D.L. about truth and lies, and that D.L. "knows it's better to be honest than lie."¹ After a colloquy, Frost reiterated her testimony that D.L. understood it was better to tell the truth than to lie. Lewis did not object to the second instance of this testimony. Frost also testified that Lewis's parents did not believe D.L.'s accusations. The trial court sustained Lewis's objection to the testimony. However, Lewis did not request a curative instruction.

Lewis's objections and motion for a mistrial based on this testimony were denied because the trial court concluded Frost's testimony was not a comment on D.L.'s credibility. Lewis claims this testimony violated his rights to a jury trial under the Sixth and Fourteenth Amendment, and article I, sections 21 and 34 of the Washington Constitution.

The trial court has significant discretion in admitting evidence, and in ruling on a motion for a mistrial.² Abuse of discretion occurs when the trial court's decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.³

Generally, no witness may testify regarding another witness's credibility. Such

¹ Report of Proceedings (RP) (Nov. 12, 2008) at 39–40.

² State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001); State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997); State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

³ State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

testimony is unfairly prejudicial because it invades the exclusive province of the jury.⁴

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⁴ Demery, 144 Wn.2d at 759.

determining whether a statement is improper opinion testimony, we consider the totality of circumstances in the case, including (1) the type of witness, (2) the nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence.⁵

Frost's testimony was entirely proper. She did not testify that she believed D.L. had told the truth in accusing Lewis, or that D.L. was generally truthful. Her testimony is easily distinguishable from the improper testimony at issue in State v. Sutherby,⁶ State v. Jerrels,⁷ and State v. Saunders.⁸

In Sutherby, the alleged victim's mother testified that she could tell when her daughter was lying because she makes a half smile when she lies, but did not make a half smile when she accused Sutherby of rape.⁹ The Sutherby court explained that her testimony was prejudicial because it conveyed not only that her daughter told the truth when she disclosed the abuse, but that jurors could evaluate her daughter's credibility by a whether or not she made a half smile while testifying.¹⁰

In Jerrels, the defendant's wife testified that she believed her children were telling the truth when they reported their father had sexually assaulted them.¹¹ The

⁵ Id.

⁶ 138 Wn. App. 609, 617, 158 P.3d 91, aff'd, 165 Wn.2d 870, 204 P.3d 916 (2009)

⁷ 83 Wn. App. 503, 507–08, 925 P.2d 209 (1996).

⁸ 120 Wn. App. 800, 812–13, 86 P.3d 232 (2004)

⁹ 138 Wn. App. at 616–17.

¹⁰ Id. at 617.

¹¹ 83 Wn. App. at 507.

Jerrels court determined that the questions asked “were clearly improper because the prosecutor inquired whether she believed the children were telling the truth.”¹²

In Saunders, the defendant challenged a police officer’s comment that the defendant’s answers to questions “weren’t always truthful.”¹³ Although the Saunders court concluded the testimony was improper, it held the error harmless because of the “overwhelming untainted evidence” of Saunders’s guilt.¹⁴

Frost’s testimony, by contrast, did not convey her opinion that D.L. was truthful in accusing Lewis or in testifying, and did not give the jury a method for determining whether D.L. was telling the truth in a given instance. Frost simply testified that she had spoken with D.L. about the difference between telling the truth and telling a lie, and that D.L. knew it was better to tell the truth than to lie.

Moreover, Frost’s testimony was largely duplicative of other evidence, which Lewis does not challenge on appeal. Child interview specialist Carolyn Webster also testified that D.L. “could tell the difference between a truth and a lie and that she knew that telling a lie was wrong.”¹⁵ And the jury watched a recording of the interview Webster conducted with D.L. in which she demonstrated her ability to distinguish between truth and lies.

The trial court’s rulings to allow the testimony and to deny Lewis’s motion for a mistrial were decisions well within its discretion. There was no error.

¹² Id. at 508.

¹³ 120 Wn. App. at 812.

¹⁴ Id. at 813.

¹⁵ RP (Nov. 6, 2008) at 129.

Voluntary Absence

Lewis claims the trial court violated his right to be present during his trial under the Fifth, Sixth, and Fourteenth Amendments, and article I, section 22 of the Washington Constitution. We disagree.

After the State rested its case and the defense presented its witnesses, Lewis asked the trial court for additional time to decide whether to testify. The trial court granted his request and continued the trial until the next morning. Lewis did not appear the following morning. The defense investigator informed the court he had been unable to contact Lewis.

The court continued the trial for an hour to allow the investigator to find Lewis. The investigator returned and informed the court that he had contacted Lewis's parents, who were concerned Lewis would harm himself. The investigator also contacted hospitals and jails in King and Pierce counties, to no avail. The court issued a bench warrant for Lewis's arrest and made a preliminary finding that Lewis voluntarily absented himself from his trial.

The court then recessed until the following Monday morning. Lewis again failed to appear. Trial concluded in his absence, and the jury returned its verdicts. Lewis was apprehended by the FBI Fugitive Task Force approximately two months later.

At his sentencing hearing, he explained his absence:

When I left that Wednesday I had got dropped off at the bus stop. There was a black truck that rolled up on me and said if I showed up in court my family would be in danger. . . . I didn't tell [my defense attorney] what it was because I didn't know how it would turn out since when I was in court it wasn't going in my favor anyways.^[16]

He explained that he was worried about causing distress to his family, and went to stay with his fiancée. The court found Lewis's explanation not credible and reaffirmed its ruling that he had voluntarily absented himself.

A court's decision regarding voluntary absence is reviewable for abuse of discretion.¹⁷

Although both federal and state constitutions provide a criminal defendant the right to be present at trial, that right may be waived expressly or impliedly.¹⁸ An implied waiver occurs when the court determines, based on the totality of the circumstances, that the defendant voluntarily absented himself from the trial.¹⁹ In making that determination, the trial court must (1) make sufficient inquiry into the circumstances of the defendant's disappearance to justify a finding whether the absence was voluntary; (2) make a preliminary finding of voluntariness, when justified; and (3) afford the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed.²⁰ The presumption against waiver must be the overarching principle throughout the inquiry.²¹

The trial court's actions in this case met these requirements, and the circumstances strongly support its determination that Lewis's absence was voluntary.

¹⁶ RP (Jan. 16, 2009) at 3–4.

¹⁷ State v. Garza; 150 Wn.2d 360, 366, 77 P.3d 347 (2003).

¹⁸ Id. at 367.

¹⁹ Id.

²⁰ Id.

²¹ Id. at 367–68.

The court gave Lewis the opportunity to explain his absence before imposing sentence, and was well within its discretion in finding that explanation not credible. We do not review a trial court's credibility determinations.²² Given these facts, Lewis fails to demonstrate that the trial court did not apply the presumption against waiver.

The trial court's determination that Lewis voluntarily absented himself from trial was well within its discretion. Lewis waived his right to be present.

Same Criminal Conduct

At sentencing, Lewis argued that all three of his convictions constituted the same criminal conduct. The court disagreed and counted all three offenses separately. The State now concedes the trial court erred in failing to find that two of his offenses constituted the same criminal conduct. We agree that counts one and four involved the same criminal conduct, but hold that count three did not.

A trial court's determination of whether separate offenses constitute the same criminal conduct is reviewed for a "clear abuse of discretion or misapplication of the law."²³ Separate offenses constitute the same criminal conduct if they require "the same criminal intent, are committed at the same time and place, and involve the same victim."²⁴

The State concedes counts one and three, the two convictions for rape of a child, were the same criminal conduct under State v. Tili.²⁵ The State acknowledges

²² State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

²³ State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440 (1990).

²⁴ RCW 9.94A.589(1)(a).

²⁵ 139 Wn.2d 107, 119–20, 985 P.2d 365 (1999) (three rape convictions based

that two

on three separate penetrations over a two minute period constitute the same criminal conduct).

of the alleged acts of rape required the same intent, occurred at the same time and place, and involved the same victim. Because we cannot be sure that the jury did not rely upon these two acts as the basis for the two rape convictions, we are constrained to accept the State's concession.²⁶ Counts one and four must be counted as the same criminal conduct.

Count three, which alleged the offense of first degree child molestation, clearly did not constitute the same criminal conduct as the two rapes, because count three was based on acts occurring at a different time and place. Count three was based on a single instance in which D.L. touched Lewis's genitals. Lewis himself claimed this was approximately a month or a month and a half before the night he raped D.L. both digitally and genitally. Also according to Lewis, the molestation occurred on the bed in the apartment, while the two rapes occurred on the couch. There is no evidence from which a jury could conclude that the molestation occurred at the same time and place as the two acts of rape. The trial court did not abuse its discretion in concluding count three was not the same criminal conduct as counts one and four.

Lewis's Statement of Additional Grounds for Review

In his statement of additional grounds for review, Lewis asserts he was under the influence of drugs when officers interviewed him and he gave incriminating statements. But the trial court considered this argument and rejected it, finding Lewis's testimony on that subject not credible. Again, we do not review a trial court's credibility determinations.²⁷ Lewis's second claim concerning his trial counsel's performance is

²⁶ See State v. Dolen, 83 Wn. App. 361, 364–65, 921 P.2d 590 (1996).

also without merit.

We affirm Lewis's convictions, but remand for resentencing for the trial court to consider counts one and four as the same criminal conduct.

Edmonton, J.

WE CONCUR:

Jan, J.

Becker, J.

²⁷ Camarillo, 115 Wn.2d at 71.